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No. 90-1467

Supreme Court, U.S.
FILED
MAR 12 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

-v-

UNITED STATES OF AMERICA AND
SANDRA B. BAKER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by failing to recognize that this Court's construction of the Anti-Injunction Act, 26 U.S.C. § 7421(a), in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) and *Bob Jones University v. Simon*, 416 U.S. 725 (1974), does not serve to divest a district court of jurisdiction to enjoin collection of taxes undertaken in bad faith and in derogation of specific government representations that collection would be forborne?

2. Whether the court of appeals erred by failing to recognize that the context of an effort to enjoin the collection of taxes does not alter the character of the irreparable injury that is presumed to result from a constitutional violation?

3. Whether an agency's arbitrary and capricious disregard of its own procedures which constitute a want of good faith and a violation of due process is a factual basis for applying the *Williams Packing* exception to the Anti-Injunction Act?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

Church of Scientology of California

United States of America

Sandra B. Baker

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1990

NO. 91-____

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

-v-

UNITED STATES OF AMERICA and
SANDRA B. BAKER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California ("the Church") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Ninth Circuit (App. 1a) is reported at 920 F.2d 1481 (9th Cir. 1990). The May 10, 1990 order of the United States District Court for the Central District of California (App. 1a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on December 12, 1990 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides, in pertinent part:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such

tax was assessed.

26 U.S.C. § 6672 provides, in pertinent part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect any such tax, ... or willfully attempts in any manner to evade or defeat any such tax or payment thereof, shall ... be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6103(a)(1) provides in pertinent part that:

> Returns and return information shall be confidential, and except as authorized by this title --
>
> (1) no officer or employee of the United States ... shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

STATEMENT OF THE CASE

The underlying facts are set forth in the opinion of the court of appeals, 920 F.2d 1481 (9th Cir. 1990), and may be fairly summarized as follows:

1. On March 9, 1989, the Internal Revenue Service ("IRS") issued a notice of proposed adjustment of Federal Insurance Contribution Act ("FICA") and Federal Unemployment Tax Act ("FUTA") taxes for the tax years of 1976 through 1986 to the Church of Scientology of California ("the Church"). On April 7, 1989, the Church filed a timely protest with the IRS challenging each and every proposed adjustment. The IRS rejected that protest and the Church, on May 22, 1989, filed a supplemental protest which the IRS also rejected, thereby extinguishing unilaterally the Church's administrative appeal rights concerning this dispute. In July and August 1989, the IRS made assessments for the tax periods in question.

The Church and the IRS thereafter entered into discussions concerning the FICA and FUTA assessments. Stanley Kong, IRS Examinations Branch Chief, told the Church's tax counsel that if the Church made a token payment of the disputed FICA and FUTA taxes for one employee for each tax period in question and submitted claims for refund and abatement, then the IRS, pursuant to an express provision of the Internal

Revenue Manual,[1] would forbear from attempting to collect those taxes until the claims for refund and abatement were resolved. On September 22, 1989, the Church paid the taxes for a single employee for each tax period at issue and filed claims for refund and abatement.

On October 23, 1989, Revenue Officer Sandra B. Baker contacted the Church's tax counsel and, just as Examinations Branch Chief Kong had done earlier, represented that the IRS would abide by the provisions of the Internal Revenue Manual and stated that she would undertake no collection activities while the Church's claims for refund and abatement were pending.

On January 5, 1990, Baker wrote to the Church's tax counsel and requested a list of the Church's officers to enable the IRS to make assessments for the disputed taxes directly against those individuals pursuant to 26 U.S.C. § 6672. The Church responded by reminding Baker that the legitimacy of the assessments was being challenged, and that collection activities with respect to those assessments were abated while the Church's refund claims were under

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1. Policy Statement P-5-16, Policies of the IRS Handbook, 1 Administration Internal Revenue Manual (CCH) at 1305-11.

consideration, both as a matter of IRS policy and upon the express representations of Baker and Kong.

On April 4, 1990, Baker served a total of seven notices of levy upon several banks, including banks which, because of earlier administrative summons she had issued, Baker knew to have no accounts of the Church. On April 6, 1990, the IRS made assessments against twenty-four individuals for the Church's disputed FICA and FUTA taxes, including a number of persons who had never occupied any position of responsibility in the Church, one person who had never had any relationship at all with any Church of Scientology, and the late L. Ron Hubbard, the Founder of the Scientology religion, who had been deceased for more than four years.

2. The Church brought this suit against the IRS and Baker on April 24, 1990, seeking both injunctive relief and damages for:

a. Wrongful disclosure of confidential taxpayer information under 26 U.S.C. § 6103 by the improper issuance of the bank levies and the individual assessments;

b. Violation of the due process clause of the Fifth Amendment of the United States Constitution by virtue of the IRS' representations that collection activity would be abated pursuant to the policy statement of the

Internal Revenue Manual and the IRS' later disregard of those representations;

c. Violation of the due process clause by treating the Church and its parishioners differently from other religions;

d. Violation of the First Amendment by engaging in unlawful and arbitrary actions against the Church motivated by an impermissible institutional hostility toward the Scientology religion; and

e. Violation of the "Taxpayers Bill of Rights" by improperly assessing the Bank levies and the individual assessments.

That same day, the district court granted the Church's *ex parte* request for a temporary restraining order ("TRO") to maintain the status quo and an order to show cause ("OSC") why the IRS and Baker should not be enjoined from further collection efforts pending the outcome of the Church's suit (App. 31a). The IRS and Baker responded to the OSC on May 5, 1990, asserting that the district court was without jurisdiction to enjoin the collection activity at issue by operation of the so-called Anti-Injunction Act, 26 U.S.C. § 7421(a). In their response to the OSC, the IRS and Baker, through a declaration signed by Baker, asserted generally that all applicable IRS regulations had been observed, that there were factual bases for the levies on

the bank, and that the identities of the individuals assessed had been fairly determined. Baker also disputed the amount of taxes in controversy by asserting that the Church did not contest a sizeable portion of it. Significantly, however, neither the IRS nor Baker denied that both Kong and Baker had represented to Church counsel that upon the Church's payment of tax for one employee for each period and submission of claims for refund and abatement that collection would be forborne pursuant to the Internal Revenue Manual.

On May 10, 1990, the district court, without a hearing, issued an order dissolving the TRO, vacating the OSC, and denying the Church's request for preliminary injunction (App. 29a). That order was based upon the district court's conclusion that it lacked jurisdiction to issue the injunctive relief sought by operation of the Anti-Injunction Act, 26 U.S.C. § 7421(a), and for the "reasons and legal authorities cited" in the IRS' and Baker's response to the OSC.

The Church appealed the district court's May 10, 1990 order to the court of appeals on May 11, 1990, and on that day, sought and obtained an emergency stay of the district court's order denying provisional relief. That stay was dissolved on May 15, 1990 (App. 27a).

3. The court of appeals filed its opinion affirming the district court's denial of provisional relief

for want of subject matter jurisdiction on December 12, 1990. The court of appeals' affirmation is pinioned upon its interpretation of the Anti-Injunction Act, 26 U.S.C. § 7421(a), as construed by this Court in *Bob Jones University v. Simon*, 416 U.S. 725 (1974) and *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). It held that the record before it did not satisfy either prerequisite necessary to invoke the single judicial exception to the Anti-Injunction Act:

> [A]n injunction may be obtained against the collection of any tax if (1) it is "clear that under no circumstances could the government ultimately prevail" and (2) "equity jurisdiction" otherwise exists, *i.e.*, the taxpayer shows that he would otherwise suffer irreparable injury.

Commissioner v. Shapiro, 424 U.S. 614, 627 (1976) (*quoting Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)), as quoted by the court of appeals below (15247).

To reach that conclusion, however, it was necessary for the court of appeals to attempt to distinguish authority of both this Court and of various courts of appeals with the result that the conclusion negates the efficacy of both prongs of the *Williams Packing* test. The opinion removes from the scope of

the first prong instances such as this where the government undertakes to collect taxes despite uncontroverted evidence that the government explicitly represented to the taxpayer that collection would be forborne. The opinion also calls into direct conflict holdings that constitutional violations presumptively create irreparable injury by holding that a later, legal remedy is sufficient to render even constitutionally forbidden harm capable of adequate non-injunctive remedy.

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional importance to the continued viability of the single, narrow judicial exception to the Anti-Injunction Act's bar to enjoining the collection of taxes. That exception, crafted in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), and refined in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), recognizes that the judicial exception to the Act's proscription is extremely limited. However, it does exist, and the court of appeals has interpreted that exception so narrowly that it has essentially read it out of existence.

The effect of *William Packing* and *Bob Jones University* is essentially to hold that the Act divests courts of jurisdiction to enjoin tax collection if the government acts in good faith. The court of appeals has effectively nullified that simple, fundamental

requirement by concluding that in an instance of uncontested and manifest bad faith -- the government making explicit representations to the taxpayer that collection would not be pursued and then commencing collection anyway -- the exception has no application. The court of appeals opinion is thus in direct conflict with both *Williams Packing*, *supra*, at 7-8 ("To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act -- protection of the collector from litigation pending a suit for refund.") and *Bob Jones University*, *supra*, at 740 "There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws. . .")

The second prong of the *Williams Packing* test is also called into conflict here, with constitutional dimensions of significant import. The court of appeals examined piecemeal the Church's arguments regarding the irreparable harm visited upon the Church by the conduct of the IRS, but never examined the presumed harm inherent in a constitutional violation arising from the government's bad faith conduct. It is no answer to the constitutional issues of intrusion upon the Church's First Amendment and due process rights to fragment them and dispose of them as if they were operating in a vacuum.

The Church respectfully submits that when the government does not dispute that it encouraged a

taxpayer's reliance upon a representation made by government personnel only to ignore those representations and by bad faith impinge upon that taxpayer's Establishment Clause and Due Process Clause rights, irreparable harm is both palpable and presumed. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Miller v. Standard Nut Margarine Co.*, 284 U.S 498, 510 (1932) (Anti-Injunction Act no bar to enjoining collection of tax which IRS had stated would not be collected as agency conduct was "arbitrary and oppressive."); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (*quoting* 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2948 at p. 440 (1973) ("When an alleged deprivation of constitutional rights is involved, most courts hold that no further showing of irreparable injury is necessary.")

The court of appeals would create a different class of irreparable injury if the constitutional transgressor is the Internal Revenue Service. It would, by its opinion below, elevate a statute of administrative convenience to a higher plateau than that occupied by the Bill of Rights, even when the transgression is manifested by uncontroverted governmental bad faith.

I. The Court of Appeals Opinion Should Be Reviewed Because It Effectively Nullifies The First Prong Of The Williams Packing Test

This Petition addresses the conflict between the court of appeals opinion below and the judicially created exception to the Anti-Injunction Act, 26 U.S.C. § 7421(a).[2] That exception has been plainly stated:

> [A]n injunction may be obtained against the collection of any tax if (1) it is "clear that under no circumstances could the government ultimately prevail" and (2) "equity jurisdiction" otherwise exists, *i.e.*, taxpayer shows that he would otherwise suffer irreparable injury.

Commissioner v. Shapiro, 424 U.S. 614, 627 (1976) (*quoting Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).

This "Court's unanimous opinion in *Williams Packing* indicates that the case was meant to be the

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2. The Church does not contend that any of the exceptions to the application of the Act that are set forth in the Act itself apply to these circumstances.

capstone to judicial construction of the [Anti-Injunction] Act." *Bob Jones University v. Simon*, 416 U.S. 725, 742 (1974). Indeed, that opinion is the articulation of this "Court's rediscovery of the Act's purpose." *Id.* That purpose is clear and unmistakable:

> The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, "and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Navigation Co., supra*, 7, 82 S.Ct., at 1129. See also, *e.g., States Railroad Tax Cases*, 92 U.S. 575, 613-614, 23 L.Ed. 663 (1876). *Cf. Cheatham v. United States*, 92 U.S. 85, 88-89, 23 L.Ed. 561 (1876). The Court has also identified "a collateral objective of the Act -- protection of the collector from litigation pending a suit for refund." *Williams Packing, supra*, 370 U.S., at 7-8, 82 S.Ct. at 1129.

Id. at 736-37.

The *Williams Packing* court explicitly delineated just how narrow the judicially created exception to the Anti-Injunction Act is when it wrote:

> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of the suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction and the complaint must be dismissed. *To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act --- Protection of the collector from litigation pending a suit for refund.*

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7-8 (1962) (emphasis supplied).

This Court's construction of the judicially created exception to the Act is thus plain. To assure that the collection of taxes is conducted with "a minimum of preenforcement judicial interference," *Bob Jones University, supra*, at 736, and "to require that the

legal right to the disputed sums be determined in a suit for refund," *Williams Packing, supra*, at 7, this Court has recognized that it would be counterproductive and contrary to the purposes of the Act "[t]o require more than good faith on the part of the Government" *Id.* The concept of governmental good faith is the precise distillation of the *Williams Packing* rule that places the burden on the taxpayer to negate the possibility of government success on the merits with resulting irreparable injury.[3] It is precisely the element of good

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3. This Court has acknowledged that the *Williams Packing* test essentially boils down to a measure of governmental good faith. In rejecting Bob Jones University's assertion that the Act did not apply because the government was attempting to regulate admissions policies at private universities rather than protecting revenues, this Court wrote:

> The Service bases its present position with regard to the tax status of segregative private schools on its interpretation of the Code. *There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws, and, without indicating a view as to whether the Service's interpretation is correct, we cannot say that its position has no legal basis or is unrelated to the protection of revenues.*

Bob Jones University, supra, at 740 (footnote omitted and emphasis supplied).

faith that is negated by the government's conduct in this case that the court of appeals sanctioned and which brings the opinion below into direct conflict with *Williams Packing* and *Bob Jones University*.

This Court is not presented with a situation where the IRS has made a good faith assessment of a tax and sought to collect it. Nor is this Court presented with an instance in which assessment and collection were colorably within the confines of authorized acts, reasonable interpretations, and satisfied procedures. This Petition presents a case in which the IRS does not contest the evidence that it deliberately contravened a procedural safeguard which it had twice expressly represented to the Church that it would follow, and levied and commenced collection of taxes while the promised procedures went unexhausted.

In such a circumstance, this Court has stated that "if the Internal Revenue Service does attempt to collect the tax by levy or otherwise, before such exhaustion of remedies . . . the collection is not protected by the Anti-Injunction Act and may be restrained by a United States district court at the instance of the taxpayer." *Commissioner v. Shapiro, supra*, at 617. In other words, whatever the Anti-Injunction Act does, it does nothing unless and until the IRS plays fairly.

That is the modest burden that the IRS shoulders under this Court's holdings in *Williams Packing* and

Bob Jones University, and it is precisely the burden that the court of appeals negated in this case, thereby coming into direct conflict with this Court's earlier holdings. The means to that end was a series of conclusions designed to distinguish other cases in which injunctions issued when the IRS misled taxpayers which, the Church respectfully submits, elevates semantical acumen above the requirement of governmental good faith.

The IRS has been enjoined as a result of using fraudulent representations as a means of tax collection. In *Mitsukiyo Yoshimura v. Alsup*, 167 F.2d 104 (9th Cir. 1948), the court held that the Anti-Injunction Act was no bar to an injunction sought upon a showing that, in 1944, a taxpayer of Japanese descent was the subject of fraudulent and coercive misrepresentations by IRS agents who, among other things, threatened him with internment if he did not sign incriminating documents and a consent to an assessment in blank. *Id.* at 105. In the opinion below, the court of appeals distinguished the *Mitsukiyo Yoshimura* case by observing that "[n]o showing of similar misconduct appears in the record. The Church has not demonstrated how the representation that the IRS would temporarily forbear collecting the disputed deficiencies coerced or defrauded the Church in any manner." (15250.)

That analysis misses the point. The focus of the *Williams Packing* rule is governmental good faith, so

whether the Church was coerced or defrauded in precisely the same manner of the taxpayer in *Mitsukiyo Yoshimura* is not germane. What matters is that both that taxpayer and the Church were deceived by the IRS into taking steps in reliance upon false representations made by the IRS. Both that taxpayer and the Church were victimized by governmental bad faith.

To the same effect is *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), in which this Court enjoined collection of a tax which the Commissioner of Internal Revenue had "repeatedly" determined to be inapplicable to the taxpayer's product, and where the taxpayer proceeded "upon the assurance from the Bureau [of Internal Revenue] that its product would not be taxed." *Id.* at 510. The court below in the instant case distinguished *Standard Nut* as follows: "No showing has been made that the IRS assured the Church that no taxes were owing. Likewise, there has been no showing that the Church relied upon the claimed assurance to its detriment." (15251.)

Again, the court of appeals' analysis demands an artificially precise alignment of the facts that is not warranted by *Standard Nut* or *Williams Packing*. Just as here, the *Standard Nut* court confronted a situation in which the IRS made specific representations to the

taxpayer and then reneged.[4] The actual broken promise is not the correct focus; what matters is that the promise was broken and that there, as here, the taxpayer took steps in reliance upon the promise before it was broken. The bad faith lies not in contents of the misrepresentation but rather in the fact that there was a misrepresentation.[5]

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4. The court of appeals below, after pointing out that there was conflicting evidence presented to the district court on certain factual points, stated that "[w]here the record presents 'material issues of disputed fact' the district court lacks jurisdiction to grant an injunction. *Kaestner v. Schmidt*, 473 F.2d 1294, 1296 (9th Cir. 1973)." (15250.) However, the IRS and Baker have never contested the fact that both Branch Chief Kong and Baker herself expressly informed the Church's counsel that collection would not be pursued upon the token payment set forth in the Internal Revenue Manual or that collection activity commenced despite those representations. Thus, the two key facts that constitute the actual bad faith are uncontroverted.

5. *Standard Nut* was the seminal case on the judicially created exception to the Anti-Injunction Act's jurisdictional bar until *Williams Packing* was decided. While the *Williams Packing* court shifted the focus on the analysis, it neither supplanted nor discredited *Standard Nut*. "The [*Williams Packing*] Court in essence read *Standard Nut* ... as a case where the Service had no chance of success on the merits." *Bob Jones University, supra*, at 745.

The court of appeals' hypertechnical reading of the *Mitsukiyo Yoshimura* and *Standard Nut* cases is in direct conflict with this Court's rule established in *Williams Packing* and reiterated in *Bob Jones University*. The result is that this case presently stands for the proposition that even in an instance where bad faith by deception is practiced by the tax collector, the rule that requires only that the government act in good faith does not apply.[6]

As discussed in more depth in the ensuing section of this Petition (addressing the important constitutional issue for which review is urged), this case presents a collision between a taxpayer's right to rely on the government's obligation to act in good faith and the statutory right of the government to collect taxes with a minimum of preemptive judicial interference. The government's right under the Act is circumscribed only by a good faith requirement that is negated by the facts of this case but which the court of appeals

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6. The same infirmity infects the court of appeals' conclusions that the district court lacked jurisdiction to enjoin the wrongful disclosure of the Church's confidential tax return information to banks with which the Church did not do business (in violation of 26 U.S.C. § 6103) and to supposedly "responsible" persons (ostensibly pursuant to 26 U.S.C. § 6674), and that the district court lacked jurisdiction to enjoin the levying of those allegedly "responsible" persons for the Church's disputed FICA and FUTA taxes.

tolerated. To avoid a construction that essentially nullifies the only requirement this Court places on the IRS to be free from injunctions which halt the collection of revenue, this case warrants this Court's review.

II. This Petition Presents An Issue Of Sufficient Constitutional Importance To Merit This Court's Review

In this case, the second prong of the *Williams Packing* test -- requiring that the taxpayer demonstrate that he would suffer irreparable injury absent an injunction -- is defined by a series of facts that raise a constitutional question of exceptional significance arising from the governmental good faith burden which *Williams Packing* articulated. Here, the direct consequences of the bad faith act established on the record are: (1) a violation of the First Amendment's Establishment Clause and the Church's equal protection rights by the application of procedures with respect to this Church different from the treatment accorded other taxpayers; and (2) a violation of the Fifth Amendment's Due Process Clause by arbitrary and capricious acts in derogation of procedural safeguards established by a government agency for the benefit of the citizen.

The court of appeals' conclusion that the Church had failed to satisfy the second prong of the *Williams Packing* test flows directly from, and is entirely dependent upon, its erroneous conclusion that the

Church had failed to satisfy the first prong of that test. The Church respectfully urges the Court to review the conclusions reached on the second prong of the test because, as demonstrated above, the court of appeals' conclusions on the merits conflict with this Court's guidance in *Williams Packing* and *Bob Jones University*, and thus cannot form the foundation for its rejection in this context of the long-standing principle that a constitutional violation creates a presumption of irreparable harm.

The court of appeals' rejection of the Church's arguments regarding the second prong of the *Williams Packing* test took the following path. The court first sought to distinguish this Court's recognition in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," by observing that "*Elrod* did not involve an attempt to restrain tax assessments." (15, 25, 3.) The Church respectfully submits that a First Amendment right -- whether speech, association, press or religion[7] -- is a First Amendment right, and if this Court had intended to differentiate among those rights it would have done so.

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7. *Elrod* arose from free speech rights of public employees who were threatened with discharge due to political party affiliation. *Elrod v. Burns*, 427 U.S. 347, 349 (1976).

The court of appeals went on to say that "[a] more important distinction, however, is the different standard that is applicable" in tax collection cases (negation of the merits of the government's claims) than in injunction cases in other contexts (probability of success on the merits). (15, 25, 3). By itself, that conclusion is worthy of review as conflicting with the rule of *Williams Packing* because *Williams Packing*'s standard for its first prong, negation of the merits of the government's claim, does not spill over into its second prong, irreparable injury.[8] It is also inconsistent with the governmental good faith requirement that is the sole burden imposed upon the IRS by *Williams Packing*, because the good faith requirement pertains to the character of the government's conduct and not to the nature of the taxpayer's injury.[9]

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8. "[I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and ... the attempted collection may be enjoined if equity jurisdiction *otherwise* exists." *Williams Packing*, *supra*, at 7 (emphasis supplied).

9. The court of appeals similarly rejected the Church's reliance upon the principle that when "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). The court concluded that *Mitchell*, which enjoined a prison closure, was inapposite because "closure of a prison is not expressly

The court of appeals then premised its rejection of the Church's showing of irreparable harm by an all-embracing conclusion that "the opportunity to sue for a refund is an adequate remedy at law which bars the granting of an injunction." (15255) That conclusion, along with other related conclusions,[10] rule by

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barred by the Anti-Injunction Act." (15253.) Such a distinction serves only to sidestep the fact that a constitutional violation, on whatever facts, creates the presumption of irreparable injury, the only proposition for which *Mitchell* was cited.

10. The court of appeals made several observations about the relationship between constitutional claims and the irreparable harm requirement that reflect that the court's entire analysis of the second prong was premised upon the mistaken assumption that the Church had failed to satisfy the first prong of the *Williams Packing* test. The court said:

> In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), the Supreme court stated that the *Williams Packing* test was applicable to First Amendment and Due Process claims raised by the taxpayer. *Id.* at 749. The court held that the taxpayer had an adequate remedy at law in an action for refund. *Id.* at 746. No special consideration is granted to injunctions against tax collection sought on constitutional grounds. "[D]ecisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim,

rendering non-justiciable all claims in which a refund claim is someday available and by reading the governmental good faith requirement completely out of the law where such a refund suit may eventually be brought. That conclusion also raises the substantial constitutional question of whether an Act of Congress intended to promote the efficiency of governmental revenue collection can nullify the otherwise applicable rule that a constitutional violation creates a presumption of irreparable injury. That direct conflict with *Williams Packing* and that constitutional question are both deserving of review.

> as distinct from its probability of success, is of no consequence under the Anti-Injunction Act." *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 (1974) (claim that statutory prohibition against lobbying by tax exempt organization is unconstitutional); *accord, United States v. American Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) (claim that withholding tax interfered with Quaker's free exercise of religion).

(15253-4.)

The court's observations noted above relate to the Court's analysis of the merits prong of the *Williams Packing* test and thus do not address the injury prong. They have no efficacy whatsoever when the government's bad faith negates the merits of its claims which lead to constitutional violations and their presumed irreparable injury.

The Church further notes that the court of appeals failed to address the Church's remaining argument that establishes the existence of irreparable harm and submits that because of the significant constitutional questions it entails, review is warranted. The Church argued that the so-called *Accardi* doctrine, articulated in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), when applied to these facts "satisfies the second prong of the *Williams Packing* test -- that equity jurisdiction exists to halt the conduct of the IRS that has been shown to render the government's chances of ultimately prevailing on the merits nil." (Appellant's Reply Br. at pp. 15-16).[11]

After making two separate representations to the Church's counsel that the IRS would follow the pertinent provision of the Internal Revenue Manual by not pursuing collection during the pendency of refund claims filed after the Church paid the disputed taxes for one employee for each tax period in question, and after the Church's reliance thereon and election to follow that

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11. The court of appeals acknowledged, but rejected, the Church's argument that the *Accardi* doctrine as applied to these facts satisfied the first prong of the *Williams Packing* test. (12251-2.) However, there is no mention of the constitutional issues inherent in the *Accardi* doctrine's application to the second prong of the test.

procedure, the IRS simply performed an unexplained about-face and began collection efforts. According to the *Accardi* case and its progeny, an administrative agency must adhere to its own internal operating procedures. *Id.* at 268. When it fails to do so, the courts will nullify the agency's actions. *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1970).

"The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct." *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986). Arbitrary and capricious conduct on the part of a federal agency is a violation of due process, because "principles of due process require an agency to follow its own regulations, which have the force of law." *Marshall v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988). "A court can set aside agency action that fails to comply with the agency's own regulations, at least where the regulations are designed to protect the individual grievant." *Id.*

The IRS does not controvert that it failed to follow Policy Statement P-5-16, which, upon the authorities cited in the preceding two paragraphs, is arbitrary and capricious conduct constituting a due process violation and creating the presumption of irreparable harm to the Church. The IRS, rather than contesting the facts that form the basis for that conclusion, instead argued that Policy Statement P-5-16 is merely advisory, rather than mandatory, and it is

promulgated for the government's benefit and not the benefit of taxpayers. The constitutional issue that merits review thus is framed: whether arbitrary and capricious disregard of an agency's procedures which constitute a want of good faith and a violation of due process is a factual basis for applying the *Williams Packing* exception to the Anti-Injunction Act.[12]

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12. The attention the court of appeals did devote to the *Accardi* doctrine was confined to defining it out of relevance to any aspect of this case by an extremely constricted reading of its facts:

> The Church argues that *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) provides that when the IRS publicizes a policy it has promulgated for the express benefit of taxpayers, the Government must act in compliance with that policy. The Church's reliance upon *Heffner* is misplaced. Heffner is a criminal case. It does not involve an application of the Anti-Injunction Act. *Id.* at 810.

(15251-2.) What is significant about *Heffner* is not the fact that it arose in a criminal setting. What is significant about *Heffner* is that it holds that an "agency of the government must scrupulously observe rules, regulations, or procedures which it has established." *Id.* at 811.

CONCLUSION

For the reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 12, 1991

APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)	
	)	CA# 90-55514
Plaintiff-Appellant	)	
	)	DC# CV-90-2042-JMI
vs.	)	Central California
UNITED STATES OF AMERICA, et al.,	)	
Defendants-Appellees	)	

OPINION

ALARCON, Circuit Judge:

The Church of Scientology of California (Church) appeals from the denial of its request for a preliminary injunction against the Internal Revenue Service (IRS). The district court concluded it lacked subject matter jurisdiction and, therefore, was precluded from granting this relief by the Anti-Injunction Act, 26 U.S.C. §7421. The Church contends that the record demonstrates that the district court has the jurisdiction to grant equitable relief pursuant to the judicial exception to the Anti-Injunction Act. We disagree and affirm.

I.

This case arises from an action filed by the Church against the IRS in which it alleged:

1. Wrongful disclosure of taxpayer information under 26 U.S.C. §6103 by improperly issuing bank levies and individual assessments.

2. Violation of the First Amendment of the United States Constitution by engaging in unlawful and arbitrary actions against the Church motivated "by an impermissible hostility to the scientology religion."

3. Violation of the due process clause of the Fifth Amendment by treating the Church and its parishioners differently from other religions.

4. Violation of the due process clause by failing to follow established IRS policy.

5. Violation of the "Taxpayers Bill of Rights" by improperly assessing the bank levies and individual assessments.

The Church presented the following version of the facts in its complaint and supporting declarations: On March 9, 1989 the IRS issued a notice of proposed adjustment of Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes for the tax years of 1976-1986 based upon a disallowance of the Church's tax exempt status.[1] On

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1. In 1987, in *Church of Scientology of California v. Commissioner of Internal Revenue*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), we upheld a revocation of the Church's tax exemption status for the years 1970-1972. Among the factual findings in that case were that significant sums of Church money had inured to the benefit of the Church's founder L. Ron Hubbard and his family during the years in question. These benefits included the transfer of several million dollars in Church funds to a sham corporation controlled by Hubbard and a plan by which 10% of the gross income of all Scientology congregations,

April 7, 1989, the Church filed a protest with the IRS challenging each proposed adjustment. The IRS rejected the protest. A supplemental protest filed on May 22, 1989, was also rejected.

Assessments were made by the IRS in July and August of 1989. Thereafter, the Church entered into discussions with Stanley Kong, IRS Examinations Branch Chief. Kong told the Church that if it made a token payment of the FICA and FUTA taxes for one employee for the period in question and submitted claims for refund and abatement the IRS would forbear attempting to collect the balance of the assessment while such claims were being considered. On September 22, 1989, the Church made payment of the FICA and FUTA taxes for one employee for the period in question and submitted claims for refund and abatement.

On October, 23, 1989, Revenue Officer Sandra Baker contacted Church representatives in order to commence collection of the claimed deficiency. The Church alleges that Baker agreed that pursuant to IRS policy P-15-6, as set forth in the Internal Revenue Manual, she would forbear from attempting to collect additional

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franchise and organizations were to be paid directly to Hubbard as "debt repayments." *Id.* at 1318-19.

funds while the administrative refund claims were pending. On January 5, 1990, Baker wrote the Church's counsel and requested a list of the Church's officers so that the IRS could make assessments for the asserted tax deficiencies directly against the responsible Church officials as authorized by 26 U.S.C. §6672.[2] The Church informed Baker that it challenged both the legitimacy of the individual assessments, and the appropriateness of any other tax collection activities while its refund claim was under consideration.

On April 4, 1990, Baker served seven notices of levy to selected banks. On April 6, 1990, the IRS mailed assessments against twenty-four individuals, including the late L. Ron Hubbard, for the purported tax deficiencies. The Church requested that the IRS release the levies. The IRS refused to do so.

On April 24, 1990, the Church filed this action in the district court. On the same date, the district court granted the Church's *ex parte* request and issued a

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2. "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect any such tax,... or willfully attempts in any manner to evade or defeat any such tax or payment thereof, shall... be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

temporary restraining order (TRO) to maintain the status quo of the parties and an order to show cause (OSC). On May 5, 1990, the Government filed its response to the OSC. The Government asserted that the district court lacked subject matter jurisdiction to grant injunctive relief under the Anti-Injunction Act, 26 U.S.C. § 7421. In support of its claim the Government submitted a declaration signed by Baker. Baker declared that all applicable IRS regulations were complied with in making the assessment against the Church. She also declared that the Church was challenging only a part of the asserted deficiency. She declared further that the Church did not dispute that it owed $6,500,000 in taxes and interest to the Government. Baker's declaration also sets forth the factual basis for levying on each bank and how the identities of the individuals to be assessed were determined. The declaration did not include any discussion of Baker's representations to the Church concerning forbearance. The district court denied the Church's request for injunctive relief before the date set for filing of the Church's reply to the IRS's response to the OSC.

II.

The Church contends that the Anti-Injunction Act does not apply when the record shows an unlawful or unconstitutional levy and extraordinary circumstances. The Church also asserts that it has met the judicial

exception to the Anti-Injunction Act.

The Anti-Injunction Act, 26 U.S.C. §7421(a) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Anti-Injunction Act sets forth specific exceptions which, if present, will support the granting of equitable relief. The Church does not contend that the statutory exceptions are applicable to this case.

[1] The Supreme Court has explained that the principal purpose of the Anti-Injunction Act is to preserve the Government's ability to assess and collect taxes expeditiously with "a minimum of preenforcement judicial interference" and "to require that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (citing, *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962)).

We review *de novo* the denial of a motion for preliminary injunction for lack of subject matter jurisdiction. *Elias v. Connett*, 908 F.2d 521, 523 (9th cir. 1990) (citing *Jensen v. IRS*, 835 F.2d 196, 198 (9th Cir. 1987). The district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous. *Id.*

The Church relies upon *Singleton v. Mathis*, 284 F.2d 616, 618-19 (8th Cir. 1960), *Lassoff v. Gray*, 266 F.2d 745, 747 (6th Cir. 1959), and *Monge v. Smyth*, 229 F.2d 361, 366 (9th Cir.), *cert. denied* 351 U.S. 976 (1956) in support of the proposition that an injunction may be ordered if the court finds that an unlawful or unconstitutional levy has been issued and if extraordinary circumstances are shown. The Church's reliance on the continued vitality of these decisions is misplaced. Each of these cases was decided prior to the 1962 Supreme Court decision in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). Rather than providing a separate and independent exception to the Anti-Injunction Act, the Supreme Court has instructed that these decisions are part of an earlier generation of dissonant case law which was harmonized in the *Williams Packing* decision. In *Bob Jones University*, the Supreme Court stated that:

> the Court's unanimous opinion in Williams Packing indicates that the case was meant to be the capstone to the judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from the meaning, and followed in turn by the Court's rediscovery of the Act's purpose.

416 U.S. 742. The court's decision in *Bob Jones*

forecloses any reliance on the pre-*Williams Packing* decisions cited by the Church. In 1964, the Sixth Circuit disavowed its decision in *Lassoff v. Gray* as being in conflict with the *Williams Packing* test. *Vuin v. Burton*, 327 F.2d 967, 970 (6th Cir. 1964). Similarly, in *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977), the *Singleton* case was only cited within the context of requirements of the *Williams Packing* test. We have not applied that portion of the *Monge* decision that recognized an exception to the Anti-Injunction Act based on unusual and extraordinary circumstances since the *Williams Packing* decision was published.[3]

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3. In *Monge*, we followed the line of cases which stated that an injunction may be granted where "unusual and extraordinary circumstances appear." 229 F.2d at 366. While *Monge* has been cited four times by this court since *Williams Packing*, it has never been for the proposition. *See, Whitney v. United States*, 826 F.2d 896, 897 (9th Cir. 1987) (whether Form 870-AD standing alone estops taxpayer from seeking a refund); *Meridian Wood Prod. Co. v. United States*, 725 F.2d 1183, 1186 (9th Cir. 1984) (waiver obviated need for sending formal deficiency notice); *Wood v. Sargeant*, 694 F.2d 1159, 1161 (9th Cir. 1982)(inability to pay tax is not a basis for invoking equity jurisdiction); *Richmond v. Weiner*, 353 F.2d 41, 45 (9th cir. 1965) (court cannot consider issue concerning pleadings that had not been raised in district court), *cert. denied*, 384 U.S. 928 (1966).

The Supreme Court now recognized a single, narrow judicial exception to the Anti-Injunction Act.

> [A]n injunction may be obtained against the collection of any tax if (1) it is "clear that under no circumstances could the government ultimately prevail" and (2) "equity jurisdiction" otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury.

Commissioner v. Shapiro, 424 U.S. 614, 627 (1976) (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).

[2] Under the first prong of the *Williams Packing* test, the district court must determine the possibility of success of the Government's assessment based upon the information available to the court at the time of the filing of the action. "Only if it is then manifest, under the most liberal view of the law and the facts, that the government cannot prove its claim" is the first part of the test satisfied. *Thrower v. Miller*, 440 F.2d 1186, 1187 (9th Cir. 1971). The burden of showing that the Government's claim is baseless is on the taxpayer. *Schildcrout v. McKeever*, 580 F.2d 994, 997 (9th cir. 1978) (citing *Shapiro*, 424 U.S. at 627-29.)

[3] To meet the second prong of the *Williams Packing* test, the taxpayer must demonstrate that it is entitled to

equitable relief. "The taxpayer must show that he has no adequate remedy at law and that the denial of injunctive relief would cause him immediate, irreparable harm." *Jensen v. IRS*, 835 F.2d 196, 198 (9th Cir. 1987) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313-14 (9th Cir. 1982)). Both prongs of the test must be met or a suit for injunctive relief must be dismissed. *Alexander v. "American United" Inc.*, 416 U.S. 752, 758 (1974).

[4] The limitations imposed by the Anti-Injunction Act also apply to the Church's attempt to enjoin "wrongful disclosures" in the form of the bank levies and individual assessments claimed to be made in violation of 26 U.S.C. § 6103.[4] In *Blech v. United States*, 595 F.2d 462 (9th Cir. 1979), we stated that where the underlying action was one to enjoin assessment and collection activities, it fell within the scope of the Anti-Injunction Act's prohibitions. *Id.* at 466.

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4. Section 6103(a) states that returns and return information are confidential, "and except as authorized by this title-(1) no officer or employee of the United States,...shall disclose any return or return information." It is not disputed that "return information" can include the fact that a taxpayer's liability is or has been under investigation.

> To hold otherwise would enable ingenious counsel to so frame complaints as to frustrate the policy or purpose behind the Anti-Injunction Statute . . . . Likewise, this statutory ban against judicial interference with the assessment and collection of taxes "is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes."

Id. (quoting *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977)). *Accord*, *Lowrie v. United States*, 824 F.2d 827, 830 (10th Cir. 1987). The Fifth Circuit has also held that an injunction sought under § 6103 was barred by the Anti-Injunction Act. *Kemlon Products & Development C. v. United States*, 638 F.2d 1315, 1320 (5th Cir.), *modified*, 646 F.2d 223 (5th Cir.) *cert denied*, 454 U.S. 863 (1981).

The Church relies on *Husby v. United States*, 672 F.Supp 442 (N.D.Cal. 1987) for the proposition that an injunction may issue to prevent further disclosure of tax return information through collection activities. In *Husby* however, the Government agreed with the taxpayer that no taxes were in fact owing. The Government further admitted in court, prior to the issuance of the injunction, that the assessment and all collection activity pursuant to it were due to computer error. *Id.* at 444. No challenge under the

Anti-Injunction Act was made, and the court expressly stated that "[t]he case at hand presents no problem as to collateral attack of a levy or assessment." *Id.* at 445. The only issue before the district court was whether the statutory remedies of 26 U.S.C. § 7431 applied to the erroneous levy. *Id.* at 442.

To avoid the bar of the Anti-Injunction Act, the Church has the burden of establishing that "under the most liberal view of the law and the facts, the United States cannot establish its claim..." *Schildcrout v. McKeever*, 580 F.2d 994, 998 (9th Cir 1978) (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)). As noted above, the declaration of Baker is in conflict with that relied upon by the Church concerning the appropriateness of the levy, and whether wrongful disclosures were made, as well as the circumstances surrounding the issuance of the individual assessments. Baker declared that since $6,500,000 in assessed taxes were not challenged by the Church, it was determined that efforts to collect the amount were thought to be appropriate.

[5] Where the record presents "material issues of disputed fact" the district court lacks jurisdiction to grant an injunction. *Kastner v. Schmidt*, 473 F.2d 1294, 1296 (9th Cir. 1973) (Anti-Injunction Act bars jurisdiction where evidence in Government affidavits established material issues of disputed fact.) *Accord*, *Thrower v. Miller*, 440 F.2d 1186, 1187-88 (9th Cir.

1971) (Anti-Injunction Act barred relief where affidavits of appellee and his attorney conflicted with affidavit of IRS officer.)

The Church asserts that because the IRS represented that it would forbear collecting the asserted deficiencies pending IRS determination of the Church's refund claim, the Government's attempts to levy an assessment thereafter constituted "fraudulent coercion" or "fraudulent representations" as a means of tax collection. This contention cannot be supported under the most liberal view of the record in favor of the Government.

[6] The cases cited by the Church in which injunctive relief was granted based on proof of coercion or fraud are distinguishable from the facts in the record before us. In *Mitsukiyo Yoshimura v. Alsup*, 167 F.2d 104 (9th Cir. 1948) the taxpayer was coerced into signing incriminating documents and falsely threatened with internment. *Id.* at 105. No showing of similar misconduct appears in the record. The Church has not demonstrated how the representation that the IRS would temporarily forbear collecting the disputed deficiencies coerced or defrauded the Church in any manner.

In *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), the taxpayer commenced its business acting in reliance upon assurances from the Commissioner of Internal Revenue of the nontaxable nature of its

product. *Id.* at 510. No showing has been made that the IRS assured the Church that no taxes were owing. Likewise, there has been no showing that the Church relied on the claimed assurance to its detriment. Viewing the facts and law in the most liberal light as required by *Williams Packing*, the Church has failed to demonstrate that the Government cannot succeed on its claim on the basis of the cited authority.

The Church next argues that it has met the first prong of the *Williams Packing* test because the Government has conceded that it could not prevail on the merits regarding the alleged violations of the rule set forth in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). We find no such concession by the Government in its brief before this court or in the record of the proceedings before the district court.

Pursuant to the *Accardi* doctrine, an administrative agency is required to adhere to its own internal operating procedures. *Id.* at 268. The Church alleges that the IRS violated Policy Statement P-5-15, Policies of the IRS Handbook, *reprinted in* 1 Administration Internal Revenue Manual (CCH) at 1305-11, which states that when a taxpayer raises a question or presents information creating reasonable doubt about the accuracy or validity of an assessment "reasonable forbearance will be exercised with respect to collection provided (1) adjustment of the taxpayers claim is within the control of the service, and (2) the interests of the

Government will not be jeopardized." *Id.*

The Church argues that *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) provides that when the IRS publicizes a policy that it has promulgated for the express benefit of taxpayers, the Government must act in compliance with that policy. The Church's reliance on *Heffner* is misplaced. *Heffner* is a criminal case. It does not involve an application of the Anti-Injunction Act. *Id.* at 810. The IRS regulation applied in *Heffner* concerned the requirement that *Miranda* warnings be given to suspects in criminal tax fraud investigations. *Id.* at 811. The remedy invoked in *Heffner* was reversal of the criminal conviction. *Id.* at 814.

The Church asserts that it is undisputed that IRS Policy Statement P-5-16, is a "procedural safeguard" which bars any collection activities until its claims for refund are resolved. The Government argues that P-5-16 indicates on its face that collection will be made if it is in the Government's interest. Accordingly, the policy was not promulgated for the *express* benefit of taxpayers. The Government further argues that it has not violated the forbearance policy. It is the Government's position that IRS Policy Statement P-5-16 does not require it to forbear collection of approximately $6,500,000 as to which there is no dispute. These conflicting contentions readily demonstrate that the Church's representation that the

Government has made a concession concerning the application of the *Accardi* doctrine is without merit.

Viewing this conflict of law in the most liberal light, it cannot be said that there is no possibility that the Government will prevail on this issue. Thus, the Church has failed to demonstrate that it has met the burden imposed by the *Williams Packing* test.

III.

[7] The Church argues that the levies violate the establishment clause of the First Amendment and the due process clause of the Fifth Amendment, and that therefore irreparable injury to the Church is presumed as a matter of law.

The Church relies on *Elrod v. Burns*, 427 U.S. 347 (1976) in support of this argument. In *Elrod*, the Supreme Court stated that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373. *Elrod* did not involve an attempt to restrain tax assessments. Instead, the court was concerned with the free speech rights of public employees threatened with discharge because of political party affiliation. *Id.* at 349. A more important distinction, however, is the different standard that is applicable in granting injunctive relief in cases where that remedy is not barred by the Anti-Injunction Act. The test applicable

in *Elrod* was "probability of success on the merits." *Id.* at 427. As noted above, under *Williams Packing*, a person seeking injunctive relief must demonstrate "under the most liberal view of the law and the facts, [that] the United States cannot establish its claim." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962).

The Church also argues that it has established violations of the due process clause of the Fifth Amendment. The Church asserts that when "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2nd Cir. 1984).

In *Mitchell*, in affirming an order granting an injunction preventing a prison closure, the Second Circuit stated: "[g]iven the evidence of increasing overcrowding. . . which constitute[s] the right alleged threat to eighth amendment rights, the district judge's finding of irreparable harm is not clearly erroneous." *Id.* at 806. The issuance of an injunction to prevent the closure of a prison is not expressly barred by the Anti-Injunction Act. Furthermore, the Second Circuit concluded an award of damages would be inadequate to remedy the harm that would flow from the closure of a 1000-bed facility and the transfer of its 475 inmates to other over-crowded prisons. *Id.* at 805. As discussed below, the Church has adequate remedies at law for all

of its tax related claims.

In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), the Supreme Court stated that the *Williams Packing* test was applicable to First Amendment and Due Process claims raised by the taxpayer. *Id.* at 749. The Court held that the taxpayer had an adequate remedy at law in an action for a refund. *Id.* at 746. No special consideration is granted to injunctions against tax collection sought on constitutional grounds. "[D]ecisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act." *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 (1974) (claim that statutory prohibition against lobbying by tax exempt organization is unconstitutional); *accord*, *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) (claim that withholding tax interfered with Quaker's free exercise of religion).

[8] The Church also argues that the fact that the assessment exceeds $9,000,0000 demonstrates irreparable harm. Mere allegations of financial hardship are insufficient to support a finding of irreparable harm. *Bob Jones Univ.* 416 U.S. at 745. *See*, *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 314 (9th Cir. 1981).

The Church further argues that the levies and assessments constitute injuries to the Church's privacy and reputational interests. The only case cited in support of this proposition is *Husby v. United States*, 672 F.Supp 442 (N.D. Cal. 1987). As discussed above, the applicability of the Anti-Injunction Act was not an issue in *Husby*. The district court stated in *Husby* that the "sole question" before it was whether the statutory remedies of 26 U.S.C. § 7431 applied to the erroneous levy. *Id.* at 442.

In *Kemlon Products & Development Co. v. United States*,638 F.2d 1315 (5th Cir.), *modified*, 646 F.2d 223 (5th Cir.),*cert. denied*, 454 U.S. 863 (1981), the taxpayer also claimed that an injunction should issue because, without that remedy, it would suffer a "loss of business reputation." *Id.*at 1318. The Fifth Circuit rejected the taxpayer's argument that a mere conclusory allegation of reputational harm demonstrates irreparable harm. *Id.* at 1322-23. The same result was reached in *Church of Scientology Celebrity Centrev. Egger*, 539 F.Supp 491 (D.D.C. 1982). "As is well settled in the tax field, irreparable injury cannot be established by an allegation of injury to reputation....[T]o establish irreparable injury, plaintiffs must allege that the financial penalties likely would cause Scientology ministers, churches or other members financial ruin or other serious consequences."*Id.* at 496 (citations omitted).

[9] The courts have repeatedly held that the opportunity to sue for a refund is an adequate remedy at law which bars the granting of an injunction.

> [P]etitioner may pay income taxes, or, in the their absence, an installment of FICA or FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for a refund. These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of advance assurance of deductibility.

Bob Jones Univ., 416 U.S. at 746; *see also Americans United*, 416 U.S. at 762 (taxpayer has adequate remedy in are fund suit following FUTA payment); *American Friend Serv. Comm.*, 419 U.S. at 11 (full opportunity to litigate tax liability in a refund suit bars equitable relief); *Zimmer v. Connett*, 640 F.2d 208, 210 (9th Cir. 1981) ("Tax assessments must be contested...in an action for a refund in the Federal District Courts.... Absent a clear and explicit congressional mandate, we shall not depart from these well marked pathways.")(citations omitted); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 314 (9th Cir. 1981) ("Since the Supreme Court decision in *Bailey v. George*, 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816 (1922), it has been established law that payment of the tax followed by a suit for refund constitutes an adequate

remedy at law.")

The Government challenges the Church's standing to seek relief for the Church officials who have been assessed under 26 U.S.C. § 6672. The Church argues that the section 6672 claims are derivative from the Government's main claim against the Church for the FICA and FUTA taxes since the Government may only satisfy the tax liability once. *Wollman v. United States*, 571 F.Supp. 824, 826 (S.D. Fla. 1983). The Church further asserts that, since the individuals assessed can seek indemnity from the Church, standing exists. *Reid v. United States*, 558 F.Supp 686, 688-89 (N.D. Miss. 1983). In as much as one of the injuries claimed by the Church is the wrongful disclosure of taxpayer information to the third parties who received the assessments, the Church has asserted a direct injury from the issuance of the assessments. Likewise, to the extent that an individual who pays a penalty assessment may be indemnified by the Church, the Church has standing to challenge the validity of the claim because it will be injured economically, albeit indirectly. However, as discussed *supra*, the fact that the Church or the individuals may challenge the correctness of the assessment in a court action for refund provides an adequate remedy as a matter of law.*Bob Jones Univ. v. Simon*, 416 U.S. at 746; *Cool Fuel*,685 F.2d at 314.

[10] Remedies at law for wrongful disclosure in violation of 26 U.S.C. § 6103 are found in 26 U.S.C.

§7431(a).Section 7431(a) provides for damages for knowing or negligent disclosure of tax return information. We have previously stated our "reluctance to imply a judicial remedy for violations of § 6103 given Congress' explicit provision of a remedy." *United State v. Michaelian*, 803 F.2d 1042, 1049(9th Cir. 1986). *See also, South Carolina v. Regan*, 465 U.S. 367, 374 (1984) (the Anti-Injunction Act prohibits injunctions in the context of a statutory scheme which provides an alternative remedy).

The Church has not met its burden under *Williams Packing*to demonstrate that it will suffer irreparable injury unless an injunction is issued. Thus, neither prong of the *Williams Packing* test has been satisfied.

IV.

The Church argues that the district court violated its right to due process of law by dissolving the TRO and denying the preliminary injunction before the Church had the opportunity to file its reply to the Government's response as permitted by the local rules. The Government argues that there was no violation of due process as the district court must dismiss an action *sua sponte* if it lacks subject matter jurisdiction, even if the parties do not raise the issue.*Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

The district court granted the Church's request for a TRO on April 24, 1990 and issued a minute order setting a hearing date for the OSC for May 21, 1990. The parties were directed to follow the local rules regarding the timely filing of their documents. Simultaneously, the district court ordered that no appearance would be necessary. The Church alleges, and the Government does not contest, that the briefing schedule established by these dates under Local Rule 7 required that the Government file its response to the OSC by May 7, 1990. The Church's reply was due on May 14, 1990. The district court received the Government's response to the Order to Show Causeon May 7, 1990. Prior to the filing of the Church's reply, the district court issued its order on May 10, 1990, vacating the TRO and dismissing the request for a preliminary injunction.

Whether the district court had subject matter jurisdiction is a question of law which this court considers *de novo.Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416,1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217(1990). The Church has had a full opportunity to present its legal arguments in the briefs filed in this court. The Church does not contend that it was denied the opportunity to present facts showing that the court had subject matter jurisdiction under the *Williams Packing* test, but rather that, to "the extent that the District Court's denial of the preliminary injunction was based on 'the reasons and legal

authorities cited in the Government's response to OSC,' it relied upon erroneous legal premises." Appellants Op. Br. at 20.

[11] Assuming arguendo that the district court erred in not allowing the Church an opportunity to file a reply to the Governments's response to the OSC, the Church must show that it has been prejudiced. *Patel v. I.N.S.*, 790 F.2d 786, 789(9th Cir. 1986) ("Because the petitioners can demonstrate no prejudice, we reject their due process claim.") The Church presented its contention that the Anti-Injunction Act was inapplicable in its Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction. It does not claim before this court that a remand is required so that it may present additional facts in response to the issues raised by the Government. Because the district court was correct in ruling that it lacked subject matter jurisdiction, the rights of the Church were not prejudiced by the dismissal of the action without permitting it to file its reply to the Government's response to the OSC.

CONCLUSION

The Anti-Injunction Act precludes the granting of an injunctive relief unless the requirements of the *Williams Packing* test are met. The Church has not demonstrated that under no circumstances could the Government

prevail. The Church has also failed to establish that it will suffer irreparable harm unless an injunction is issued. Thus, the district court correctly determined that it lacked subject matter jurisdiction to restrain the tax assessments in issue.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)
	) CA# 90-55514
Plaintiff-Appellant	)
	) DC# CV-90-2042-JMI
vs.	) Central California
UNITED STATES OF AMERICA, et al.,	) ORDER
Defendants-Appellees	)

Before: FARRIS and PREGERSON, Circuit Judges

The emergency motion for an injunction pending appeal is denied. The temporary stay entered by this court May 11, 1990 which served to reinstate the district court's temporary restraining order is vacated.

The Clerk shall issue a time schedule order.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, a Nonprofit Religious Corporation,	)	
Plaintiff/Appellant	)	CA# 90-55514
vs.	)	DC# CV-2042-JMI
UNITED STATES OF AMERICA and SANDRA BAKER, Revenue Officer,	)	Central California
Defendants/Appellees	)	

BEFORE: HUG, Circuit Judge

The temporary restraining order filed April 24, 1990 shall remain in effect pending consideration and a ruling by the designated motions panel on appellants' motion for Injunction Pending Appeal.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)
	) CA# CV 90-2042
Plaintiff,	) JMI (GHKx)
	) ORDER
	) VACATING TRO
vs.	) AND DENYING
	) PLAINTIFF'S
	) MOTION FOR
UNITED STATES OF AMERICA, et al.,	) PRELIMINARY) INJUNCTION
Defendants.	)

IT IS HEREBY ORDERED:

The Court has reviewed and considered the parties' papers concerning plaintiff's motion for preliminary injunction. The Court finds it lacks jurisdiction over this motion pursuant to the Anti-Injunction Act, 26 U.S.C. § 7421 and the reasons and legal authorities cited in the government's opposition to the instant motion. Thus, the Temporary

Restraining Order issued by the Court on April 24, 1990 is hereby vacated and plaintiff's motion for preliminary injunction is denied.

IT IS SO ORDERED.

DATED: May 10, 1990

JAMES M. IDEMAN
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA, a Nonprofit Religious Corporation,	CA# 90-2042 JMI (GHKx)
Plaintiff,	(PROPOSED)
vs.	TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
UNITED STATES OF AMERICA and SANDRA BAKER, Internal Revenue Officer,	RE: PRELIMINARY INJUNCTION
	Date: April 24, 1990
	Time: _____
	Dept: _____

Upon reading the verified complaint on file in this action, plaintiff's April 24, 1990 ex parte application for temporary restraining order and for order to show cause re preliminary injunction, the memorandum of points and authorities in support thereof, and the declarations filed in support of plaintiff's application, and it appearing to the satisfaction of the Court that this is a proper case for the issuance of a temporary restraining order and order to show cause re preliminary injunction, and that unless a temporary restraining order issues, plaintiffs will suffer irreparable injury before the matter can be heard on regular notice,

1. IT IS ORDERED THAT: The above named defendants, and each of them appear before this Court in Courtroom at _____ Street, Los Angeles, California on ___, 1990, at ____ a.m., or as soon thereafter as the matter can be heard, then and there to show cause:

Why defendants, the United States of America and Sandra Baker, their agents, servants, and employees, and each of them should not be enjoined and restrained during the pendency of this action from engaging in, doing or causing to be done, directly or indirectly, any and all of the following acts:

(a) disclosing, revealing, disseminating, communicating, or otherwise making available to any

unauthorized person or entity confidential tax return information pursuant to 26 U.S.C. § 6103;

(b) preparing, executing, filing or serving any levies or further assessments or engaging in any other collection activity regarding plaintiff's alleged liabilities under the Federal Insurance Contribution Act ("FICA") and the Federal Unemployment Tax Act ("FUTA") for any tax year beginning in 1976 through to 1986, inclusive, until plaintiff's refund claims for FICA and FUTA taxes, penalties, and interest for said tax years have been finally adjudicated both administratively and, as necessary, through the courts;

(c) engaging in any other FICA/FUTA collection actions against plaintiff for any tax year in violation of the statutes, regulations, and policies governing Internal Revenue Service conduct, including but not limited to Internal Revenue Manual (Administration), Part 1218, Policies of the Internal Revenue Service Handbook P-5-16 (March 1. 1984); and

(d) prohibiting the issuance of further levies under 26 U.S.C. § 6672 or otherwise arising from the underlying dispute until that dispute has been fully heard and decided in accordance with all applicable provisions of law.

2. IT IS FURTHER ORDERED that pending the hearing and determination of this order to show cause

re preliminary injunction, the defendants, the United States of America and Sandra Baker and their agents, servants, and employees, and each of them, shall be and they are hereby restrained and enjoined from engaging in, doing or causing to be done, directly or indirectly, any and all of the following:

(a) disclosing, revealing, disseminating, communicating, or otherwise making available to any unauthorized person or entity confidential tax return information pursuant to 26 U.S.C. § 6103;

(b) preparing, executing, filing or serving any levies or further assessments or engaging in any other collection activity regarding plaintiff's alleged liabilities under the Federal Insurance Contribution Act ("FICA") and the Federal Unemployment Tax Act ("FUTA") for any tax year beginning in 1976 through to 1986, inclusive, including those levies presently due to be executed on Wednesday, April 25, 1990 at any branches of the First Interstate Bank, Sumitomo Bank and the Sanwa Bank in California and other related levies and assessments;

(c) engaging in any other FICA/FUTA collection actions against plaintiff for any tax year in violation of the statutes, regulations, and policies governing Internal Revenue Service conduct, including but not limited to Internal Revenue Manual (Administration), Part 1218, Policies of the Internal Revenue Service Handbook

P-5-16 (March 1, 1984); and

(d) prohibiting the issuance of further levies under 26 U.S.C. § 6672 or otherwise arising from the underlying dispute until that dispute has been fully heard and decided in accordance with all applicable provisions of law.

3. IT IS FURTHER ORDERED that plaintiff's prior payment is of the total FICA tax, interest and penalty for one employee each quarter at issue and that plaintiff's prior payment of the total FUTA tax, interest and penalty for one employee for each tax year at issue shall satisfy the usual requirements for the posting of a bond, as the payment of such divisible portions of the taxes assessed and the filing of Claims for Refund and abatement are all that is required by the Internal Revenue Manual for collection to be stayed pending the resolution of plaintiff's Claims for Refund.

4. IT IS FURTHER ORDERED that copies of the summons and complaint, plaintiff's application, declarations, memorandum of points and authorities and this order to show cause re preliminary injunction and temporary restraining order be served on defendants not later than 10 days prior to the hearing. Both parties shall maintain the status quo when the levies were served.

Dated: April 24, 1990

/s/ James M. Ideman
JUDGE OF THE DISTRICT COURT

Presented on April 24, 1990 by:

/s/
William T. Drescher

WYMAN, BAUTZER, KUCHEL & SILBERT

Attorneys for Plaintiff
Church of Scientology
of California

Supreme Court, U.S.
FILED
MAY 13 1991
OFFICE OF THE CLERK

No. 90-1467

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Anti-Injunction Act, 26 U.S.C. 7421(a), divests the courts of jurisdiction to enjoin the United States from collecting the federal employment taxes that have been assessed against petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1467

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 920 F. 2d 1481. The order of the district court denying petitioner's motion for a preliminary injunction (Pet. App. 29a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1990. The petition for a writ of certiorari was filed on March 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1957, petitioner was granted recognition as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. Petitioner's tax-exempt status was revoked in 1967, however, because a significant portion of the earnings from its operations inured to the private benefit of its founder, L. Ron Hubbard, and to other private individuals. *Church of Scientology* v. *Commissioner*, 823 F.2d 1310 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988). Petitoner has, nonetheless, continued to fail to pay taxes as they come due. See 823 F.2d at 1312-1313.

On March 9, 1989, the Internal Revenue Service issued a notice of proposed adjustment to petitioner for an amount in excess of $9,000,000 for Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes for the years 1976 through 1986. The adjustment resulted directly from the disallowance of petitioner's claimed tax-exempt status for those years. Pet. App. 3a. On April 7, 1989, petitioner filed an administrative protest challenging the proposed adjustment. This protest and a supplemental protest filed by petitioner were rejected by the IRS. *Id.* at 3a-4a. An assessment for the additional taxes was then issued. *Ibid.*

In discussions that thereafter occurred between petitioner and two IRS employees, petitioner contends (Pet. 4-5) that it was advised that if it made a token payment of the FICA and FUTA taxes for one employee for each quarterly period in question and submitted claims for refund and abatement of those taxes, the IRS would forbear collection of the balance during the period that the claims were being considered. Petitioner asserts that these assurances of forbearance from collection were made pursuant to IRS Policy Statement P-5-16 (*reprinted in* 1 Admin. Int. Rev.

Man. (CCH) at 1305-11), which states in relevant part that:

> reasonable forbearance will be exercised with respect to collection provided (1) adjustment of the taxpayer's claims is within the control of the service, and (2) the interests of the Government will not be jeopardized.

Ibid. (quoted at Pet. App. 15a-16a).

On September 22, 1989, petitioner made a payment of FICA and FUTA taxes for one employee for each period in question and submitted claims for refund and abatement. Pet. App. 4a. IRS Revenue Officer Sandra Baker reviewed the claims for refund and abatement and determined that more than $6,500,000 of the total assessment of $9,000,000 was not contested by petitioner.[1] Pet. App. 6a. On January 5, 1990, Baker wrote petitioner's counsel and requested a list of its officers so that the IRS could make assessments of the unpaid taxes directly against petitioner's responsible officials as authorized by Section 6672 of the Code.[2] On April 4, 1990, Baker served seven notices of levy on selected banks. On April 6, 1990, the IRS mailed assessments against twenty-four individuals for the unpaid employment taxes. Pet. App. 5a.[3]

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[1] Although petitioner contended that it was not liable for any FICA taxes for 1984, 1985 or 1986 because it was a church eligible to elect not to pay the employer portion of FICA under Section 3121(w) of the Code, it did not challenge its liability for FUTA taxes for all relevant periods and for FICA taxes for the period from 1976 through 1983, though the amount of those liabilities and the applicability of penalties were in dispute. C.A. Doc. 1 (Complaint, Yingling Decl. § 7).

[2] Section 6672 provides in pertinent part that "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect [any] such tax, * * * or willfully attempts in any manner to evade or defeat any such tax or payment thereof, shall * * * be liable [for] a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." 26 U.S.C. 6672(a).

[3] In an affidavit filed with the court, Baker has set forth the factual basis for each levy and the method of determining the identities of the individuals against whom the assessments were issued. Pet. App. 6a.

2. Petitioner then commenced this action to enjoin the government from collecting the taxes that had been assessed. The district court initially granted an ex parte temporary restraining order but, after a hearing, vacated that order and denied petitioner's request for a preliminary injunction. The court held (Pet. App. 29a) that it lacked jurisdiction to enjoin the collection of taxes under the Anti-Injunction Act, 26 U.S.C. 7421(a), which provides in relevant part that:

> no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *.

The court of appeals affirmed, holding that the requested injunctive relief was barred by the Anti-Injunction Act. Pet. App. 1a-26a. The court noted that there is a "single, narrow judicial exception to the Anti-Injunction Act" that has been recognized by this Court's decisions (Pet. App. 10a):

> [A]n injunction may be obtained against the collection of any tax if (1) it is 'clear that under no circumstances could the government ultimately prevail' and (2) 'equity jurisdiction' otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury.

Ibid. (quoting *Commissioner* v. *Shapiro*, 424 U.S. 614, 627 (1976) (quoting *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962))). The court of appeals found nothing in the facts of this case to support petitioner's claim that the government had firmly bound itself to an indefinite suspension of collection activities. Neither Policy Statement P-5-16, nor the alleged statements of the IRS employees that the Policy would be followed, contained such concrete, unlimited assurances. Pet. App. 15a-17a. Moreover, the fact that more than $6,500,000 of the taxes that had been assessed were not in dispute quite evidently provided the government with a proper basis for proceeding to immediate collection. See *id.* at 16a. The court concluded that, "[v]iewing

the facts and the law in the most liberal light as required by *Williams Packing*, the Church has failed to demonstrate that the Government cannot succeed on its claim." *Id.* at 15a.

The court of appeals also rejected petitioner's contention that it faced irreparable injury to interests protected by the Free Exercise and Due Process Clause, noting that this Court has held that "the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act." Pet. App. 19a (quoting *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 759 (1974)). The court concluded that, on the facts of this case, "the opportunity to sue for a refund is an adequate remedy at law which bars the granting of an injunction." Pet. App. 21a.[4]

ARGUMENT

The court of appeals correctly rejected petitioner's request to enjoin the government from collecting taxes. The decision of the court of appeals does not conflict with the decisions of this Court or with the decisions of any other court of appeals. Further review by this Court is therefore not warranted.

1. The Anti-Injunction Act provides, with exceptions that are not relevant to this case, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. 7421(a). The principal purpose of the Anti-Injunction Act is to preserve the government's ability to assess and collect

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[4] The court also held (Pet. App. 22a-23a) that no injunction would issue to prevent any unauthorized disclosure of confidential return information because petitioner had an adequate remedy at law for any violation in the form of an action for damages under Section 7431(a) of the Code. This issue is not raised in the petition. See Pet. i.

taxes expeditiously with "a minimum of preenforcement judicial interference" and "to require that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones University* v. *Simon*, 416 U.S. 725, 736 (1974). The Act has been broadly construed to deprive the courts of jurisdiction to enjoin any aspect of IRS activity culminating in the assessment or collection of federal taxes. *Id.* at 738-739; *Blech* v. *United States*, 595 F.2d 462, 466 (9th Cir. 1979). A suit that falls within the Act's proscription is to be dismissed for lack of subject matter jurisdiction. See *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 757-758 (1974).

This Court has articulated a single, narrow judicial exception to the Anti-Injunction Act. Under this Court's *Williams Packing* test, an injunction may issue only when it is "clear that the Government could in no circumstances ultimately prevail on the merits" of its claim and that "equity jurisdiction" otherwise exists. *United States* v. *American Friends Service Committee*, 419 U.S. 7, 10 (1974). See *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. at 7. To satisfy the first prong of the *Williams Packing* test, the taxpayer must demonstrate that "under the most liberal view of the law and the facts, * * * the United States cannot establish its claim." *Ibid.* A showing that "the collecting officers have made the assessment, and claim that it is valid," thus generally suffices to defeat a claim for injunctive relief. *Id.* at 8. To meet the second prong of the *Williams Packing* test, the taxpayer must demonstrate that there are "special circumstances attending a threatened injury * * * bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked." *Dows* v. *City of Chicago*, 78 U.S. (11 Wall.) 108, 109-110 (1870); see *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. at 6. Before an injunction will issue, the taxpayer must therefore show that it will suffer

irreparable injury and that it has no adequate remedy at law. *Ibid.*

2. The court of appeals correctly applied this Court's decisions in concluding (Pet. App. 13a-15a) that petitioner failed to demonstrate that the government's claim for taxes was "without foundation" (370 U.S. at 8) and that petitioner therefore failed to satisfy the first prong of the *Williams Packing* test. Not only did petitioner fail to show that the assessment was invalid, it also failed to establish that the attempts to collect the taxes were improper. As the court of appeals pointed out, the Policy Statement upon which petitioner relies indicates that, with respect to taxes that have been placed in reasonable dispute by a claim for refund and abatement, "reasonable forbearance" will occur, but only for so long as "the interests of the Government will not be jeopardized." Pet. App. 15a-16a. Since more than $6,500,000 of the taxes assessed against petitioner had not been disputed, there was nothing to suggest that taking action to collect those outstanding undisputed assessments in any manner contravened the IRS Policy Statement. *Id.* at 16a-17a. Petitioner's reliance (Pet. 27-28) on *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), which requires an agency to adhere to its own regulations, is thus misplaced. Pet. App. 17a. Viewing this matter in the light most favorable to the government, "it cannot be said that there is no possibility that the Government will prevail on this issue." *Ibid.*

Indeed, petitioner does not now assert that it has met its burden of establishing that the government could not ultimately prevail on the merits of the assessment. Instead, petitioner argues that IRS personnel were acting in "bad faith" by attempting to collect the taxes after assuring petitioner that the IRS would forbear collection activities while the claim for refund was pending. Petitioner further asserts

(Pet. 13-22) that it is entitled to an injunction to prevent IRS employees from proceeding in "bad faith."

Petitioner has misinterpreted this Court's decisions in *Williams Packing* and *Bob Jones University* in asserting (Pet. 10-11) that a showing that the government is acting in "good faith" in collecting the tax is a "fundamental requirement" to application of the Anti-Injunction Act. In *Williams Packing*, this Court simply observed that the government's actions *are* in "good faith" whenever it is asserting a tax claim that is not "without foundation." 370 U.S. at 8. See also *Bob Jones University* v. *Simon*, 416 U.S. at 737.[5] The record of this case clearly reflects that the taxes that have been assessed are not "without foundation." See Pet. App. 6a; notes 1, 3, *supra*. This is sufficient to establish that the government is acting in "good faith." See *Enochs* v. *Williams Packing Co.*, 370 U.S. at 7-8.

Moreover, IRS Policy Statement P-5-16 calls for forbearance from collection only where a refund claim has cast doubt on the validity of the assessment, and even then only if the "interests of the Government will not be

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[5] In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court refused to look to the subjective motives of an IRS agent in determining whether an administrative summons had been issued in "good faith," as required by *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Rather, the Court held that the "good faith" determination is to be made through an examination of the institutional posture of the IRS, and that any inquiry into the subjective state of mind of individual agents would be improper and unnecessary. 437 U.S. at 316. A similar institutional focus on the exception to the Anti-Injunction Act is also proper. The appropriateness of a tax assessment and the manner and means by which it is collected are institutional decisions the validity of which do not turn on the actions of a single collection agent. Delving into the subjective motives of an agent would be as "undesirable and unrewarding" here as this Court found them to be in summons enforcement cases. *United States* v. *LaSalle National Bank*, 437 U.S. at 316.

jeopardized." See 1 Admin. Int. Rev. Man. (CCH) at 1305-1311. By its terms, the Policy Statement thus indicates that collection efforts will *not* be abated if it is deemed to be in the government's interest to pursue them. The Policy Statement, moreover, has no application to the collection of the $6,500,000 in taxes and interest (attributable to uncontested FUTA taxes and FICA taxes for periods prior to 1984) that were not in dispute.[6]

3. The court of appeals also correctly held that petitioner's allegations fell short of establishing the remaining prerequisites to equitable relief—in particular, that petitioner would suffer irreparable harm in the absence of an injunction and that there is no adequate remedy at law. This Court has held that it is "unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act." *Alexander* v. *"Americans United" Inc.*, 416 U.S. at 759. Notably, this Court has refused to enjoin tax

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[6] The court of appeals correctly distinguished cases cited by petitioner where injunctive relief issued based on proof of coercion or fraud by IRS agents because petitioner had "not demonstrated how the representation that the IRS would temporarily forbear collecting disputed deficiencies coerced or defrauded [petitioner] in any manner" (Pet App. 14a). The taxpayer in *Mitsukiyo Yoshimura* v. *Alsup*, 167 F.2d 104, 105 (9th Cir. 1948) (Pet. 18), was coerced into signing incriminating documents and falsely threatened with internment. As noted by the court of appeals (Pet App. 14a), "[n]o showing of similar misconduct appears in the record." And in *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932) (Pet. 19), the taxpayer commenced its business acting in reliance upon assurances from the Commissioner of Internal Revenue of the nontaxable nature of its product. The court of appeals correctly found the circumstances here to be readily distinguishable, since "[n]o showing has been made that the IRS assured [petitioner] that no taxes were owing" or "that [petitioner] relied on the claimed assurance to its detriment" (Pet. App. 15a).

collection activity despite the complaint that irreparable injury to religious and due process rights would result, holding that a suit for refund of the tax is an adequate remedy at law. *Bob Jones University* v. *Simon*, 416 U.S. at 746; *United States* v. *American Friends Service Committee*, 419 U.S. at 11. The court of appeals therefore correctly concluded (Pet. App. 19a) that the "financial hardship" petitioner claims it will endure from the collection of taxes, and the asserted effect that such "hardship" could have on petitioner's exercise of its allegedly protected activities, are not a sufficient basis for equitable relief under the Anti-Injunction Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

U.S. GOVERNMENT PRINTING OFFICE 1991—282-061/20539